Filed 9/30/03 Jackson v. Brown CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WILLIAM JACKSON, et al., Plaintiffs and Appellants, v. ERNIE BROWN, Defendant and Respondent.	A098047 (San Francisco County Super. Ct. No. 313454)

William B. Jackson and Raymond Mazon appeal from the dismissal of their claims against respondent Ernie Brown, following the grant of summary judgment in Brown's favor. We find no triable issues of fact and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Divisional managers Jackson and Mazon filed a complaint including multiple allegations against their employer, United Parcel Service (UPS), and charges of assault and defamation against UPS district manager Brown.[1]

The trial court granted summary judgment for Brown, concluding there was insufficient evidence of an assault on Mazon, and no competent evidence that it was

[1] Plaintiffs were on disability leave at the time the complaint was filed. A third co-plaintiff, Stan Predki, has not joined in this appeal.

Brown who had made the allegedly defamatory comment about the plaintiffs. This timely appeal followed the ensuing order of dismissal.[2]

DISCUSSION

A. *Standard of Review*

Summary judgment is mandatory if no triable issues of material fact exist and documentation supporting the motion entitles the movant to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Documents supporting a defense motion for summary judgment must either establish a complete defense or show the absence of an essential element of the plaintiff's case. When a defendant makes either showing, and the plaintiff's opposing documentation cannot raise triable issues regarding the defense or essential elements, summary judgment should be granted. Appellate review of such a ruling is conducted de novo. (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661.)

B. *The Assault Claim*

Mazon contends he raised a triable issue of fact regarding his claim that he was assaulted during a July 1999 meeting in Brown's office.[3] During a heated discussion of Mazon's job performance, Brown stood up behind his desk and pointed his finger close to Mazon's face, admonishing Mazon not to challenge him in front of others.[4] Mazon estimated that Brown's finger came within half an inch of his nose. Mazon instinctively pushed his chair back, fearing Brown would strike him.[5] Brown then paced the floor, clenching his fists and yelling at Mazon.

While Mazon contends he suffered a well-founded fear of an unlawful touching, he conceded at his deposition that Brown was too far away to reach him, and never came

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2 Jackson's separate appeal from the judgment following jury trial on his remaining claims against UPS is pending before this court in No. A098224.

3 For the purpose of this appeal, we accept as true the facts alleged in the evidence of the party opposing summary judgment. (See *Kelsey v. Waste Management of Alameda County* (1989) 76 Cal.App.4th 590, 594.)

4 Earlier, Brown had asked another manager originally present at the meeting to leave the office.

5 Mazon also described himself as "5'6'' about 180 pounds, compared to Brown at over 6' tall and 260 pounds."

around to Mazon's side of the desk at any point. Mazon also stated: "It appeared to me that he was doing everything possible to keep from striking me." The meeting ended after Brown had told him they could no longer work together. Mazon left Brown's office in a daze and subsequently went out on medical leave.[6] The trial court properly ruled this evidence was insufficient to establish an assault.

The cases on which Mazon relies are factually distinguishable, as is evident from Mazon's own briefing. Brown did not threaten to beat up Mazon or to slash his tires (cf. *State Rubbish Etc. Assn. v. Siliznoff* (1952) 38 Cal.2d 330, 335), nor did Brown point a gun in Mazon's direction (cf. *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608, 1617 (*Herrick*)) or fire "a warning shot." (Cf. *People v. Williams* (2001) 26 Cal.4th 779, 782-783.) Mazon was not confined to a small area where an overhead sledgehammer repeatedly pounded a steel target, damaging his hearing and causing him emotional distress. (Cf. *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal.App.3d 219, 222 (*Iverson*).) Brown's simple clenching of his fist was not sufficient to amount to an assault under the circumstances presented here, particularly in light of Mazon's own testimony that Brown remained too far away to hit him. (Contrast *Herrick*, *supra*, 19 Cal.App.4th at p. 1617, citing *Matthews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 725-727 [employee who continued to approach superior with clenched fists after being warned not to cross line supervisor had drawn in dirt was determined to be "the initial physical aggressor" and thus foreclosed from benefits under the applicable Labor Code section].)

Verbal and emotional conflict between an employee and a supervisor, including criticism of the employee's work practices, is, unfortunately, not uncommon in an employment relationship. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 717 (*Fermino*); see also *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160-161.) Brown's yelling and finger pointing, while undoubtedly unpleasant from Mazon's

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6 When Mazon did not return to work after a year on disability leave, his employment was automatically terminated in accordance with UPS policy.

point of view, would not have caused a reasonable person in Mazon's position to fear he was about to suffer physical harm. The trial court correctly ruled the evidence of Brown's behavior could not support a claim for assault.[7]

Summary adjudication on the assault claim was also proper on the ground that it was precluded by the workers' compensation exclusivity rule.[8] (See *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001; *Fermino*, *supra*, 7 Cal.4th at p. 708; *Cole*, *supra*, 43 Cal.3d at pp. 160-161.) Mazon contends his claim comes within the exception for injury "proximately caused by the willful and unprovoked physical act of aggression of the other employee." (Labor Code § 3601, subd. (a)(1).) Mazon does not claim, however, that Brown ever touched or threatened to touch him, and in fact admitted Brown was too far away to do so. Nor was Mazon's own subjective reaction sufficient to show that Brown acted with a specific intent to injure him, under the circumstances presented here. (See *Torres*, *supra*, 26 Cal.4th at p. 1009 [exclusivity exception requires something more than aggressive physical acts, which may be considered within the scope of employment]; *Williams v. International Paper Co.* (1982) 129 Cal.App.3d 810, 818-819 [distinguishing intentional acts from acts intended to injure].) The cases on which Mazon relies are also distinguishable. (Cf. *Torres*, *supra*, 26 Cal.4th at p. 1000 [fellow employee lifted plaintiff and dropped him, causing back injuries]; *Herrick*, *supra*, 19 Cal.App.4th at p. 1617 [supervisor pointed a gun at plaintiff and threatened to blow his head off]; *Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1824-1825 [plaintiff injured when defendant intervened physically to separate her from third party]; *Iverson*, *supra*, 143 Cal.App.3d at p. 222 [co-employee confined plaintiff and repeatedly pounded

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7 Nor does respondent's acceptance of Mazon's version of the confrontation *for the purpose of the motion for summary judgment* create a conflict with Brown's different description of the events during his deposition. (Cf. *Donchin v. Guererro* (1995) 34 Cal.App.4th 1832, 1839-1841 [conflicts in a witness' own testimony may create a triable issue of fact relating to credibility].)

8 The trial court did not address this additional ground urged by Brown. The parties have covered the issue in their appellate briefs, however, and have declined this court's invitation to provide supplemental briefing on the issue, pursuant to Code of Civil Procedure § 437c, subdivision (m)(2).

large sledgehammer against steel target directly above him][9].) Thus summary judgment was also proper on Mazon's assault claim based on the independent ground of workers' compensation exclusivity.

C. *The Defamation Claim*

Mazon and Jackson contend they raised a triable issue of fact that it was Brown who made an allegedly defamatory comment about them at a February 2000 staff meeting while appellants were both out on disability. When someone asked what would happen when they returned from leave, the response overheard by Benn Camicia, another UPS manager, was: "I don't know. But . . . they'll make the best three supervisors the district's had in a long time when they do come back." This comment was allegedly defamatory because the position of supervisor was two levels below appellants' position of division manager. Appellants contend the comment implied they were not competent to act as division managers and were going to be demoted, thereby seriously impugning their reputations.

When Camicia was deposed, however, he was unable to identify the speaker from among the group of three or four managers in the area at the time the comment was made.[10] Jackson submitted a declaration stating that Camicia had told him Brown was the speaker. Mazon's declaration asserted that learning of the "three best supervisors" remark had caused him emotional distress.[11] Brown properly objected, however, that

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9 The Supreme Court has also commented that *Iverson* appears overbroad in implying that all intentional torts are categorically excepted from the workers' compensation exclusivity rule. (*Torres*, *supra*, 26 Cal.4th at p. 1004; *Fermino*, *supra*, 7 Cal.4th at p. 718.)

10 When counsel reiterated: "According to your best present recollection, do you recall anybody, other than Mr. Brown, saying those words at that meeting?", Camicia replied: "I can't say anybody other than Ernie [Brown] said that, no, and I can't say Ernie said that."

11 When asked about his statements to appellants during his deposition, Camicia replied: "Was the comment made? Absolutely. Did I tell [Jackson and Mazon] that when I was—you know, after it had happened and I was furious about other things? Very well could have happened." Camicia further agreed he might have told Jackson he feared retaliation for his deposition testimony. Camicia also explained, however, that he "wasn't paying enough attention [at the time the statement was made] to know who [the speaker] was."

appellants' statements as to what Camicia said were hearsay. (See *Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216-217.)

Appellants failed to raise the argument below that their evidence was admissible as prior inconsistent statements under Evidence Code sections 1235 and 770. They are therefore precluded from arguing this theory on appeal. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1177-1178; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433; *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1192.) Instead, appellants contended below that the statement in question was a non-hearsay operative fact. Two layers of hearsay are present here, however. While Brown's underlying statement might arguably be characterized as an operative fact, Camicia's alleged statements to appellants identifying Brown as the speaker cannot be so characterized.[12] Nor was there sufficient separate circumstantial evidence to support a non-speculative conclusion that Brown was the speaker.[13] Thus summary judgment was properly granted on appellants' claim for defamation.

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12 Appellants essentially concede this point: "As to identifying Brown as the speaker, Camicia's prior out of court statements were offered for the truth of the matter asserted, and, as such, are hearsay."

13 Nor is it clear that the statement in question implied a provably false factual assertion, as required to support a claim for defamation, rather than a protected expression of opinion about appellants' performance or some possible future event. (See *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1554; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 971; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724; see also *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152.) We note that Jackson himself described the statement as "just a way of Ernie Brown expressing his dissatisfaction with us." Respondent also contends the statement in question was covered by the qualified privilege provided by Civil Code section 47, subdivision (c)(1), and appellants failed to plead and prove special damages. We need not address these issues as we affirm the trial court's ruling on the grounds discussed above.

DISPOSITION

The judgment is affirmed.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.